

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1426 of 1997

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 to 5 : NO

SHITALBEN MAHESHBHAI VERMA

Versus

MS/ SEEMS TRADING CORPORATION

Appearance:

MR VIJAY H PATEL for Petitioner
MR MJ DAGLI for Respondent No. 1
MR SR DIVETIA APP for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 16/07/98

ORAL JUDGEMENT

Heard learned advocates Mr. Asim Pandya and Mr. M.J Dagli for the petitioner and respondent no. 1 respectively and Mr. S.R Divetia, learned APP for the respondent - State.

2. Petitioner before this Court is the complainant

in Criminal Case No. 2797 of 1995 lodged before the learned Chief Judicial Magistrate, Ahmedabad (Rural). The complaint was lodged against the present respondent no. 1 in respect of a cheque for a sum of Rs. 32,78,916/- allegedly drawn by the respondent no. 1 in favour of the petitioner. The respondent no. 1 accused filed Application Exh. 46 for discharge. The said application was heard and rejected by the learned Magistrate on 29th April, 1997. Feeling aggrieved, the accused preferred Criminal Revision Application No. 71 of 1997 before the learned Addl. Sessions Judge, Ahmedabad (Rural). Under the judgment and order dated 30th September, 1997, the learned Addl. Sessions Judge, Ahmedabad (Rural) allowed the application and made an order discharging the accused of the criminal charge. Feeling aggrieved, the petitioner-complainant has preferred the present petition.

3. Facts succinctly are : The cheque in question was drawn on 5th September, 1995 and was presented by the petitioner to its banker, however, the same was dishonoured on 12th September, 1995 with an endorsement that there was an unauthorized alteration in the cheque. The cheque was again presented by the complainant and was dishonoured on 5th October, 1995. Intimation in this regard was received on 12th October, 1995 stating that the cheque was dishonoured on account of insufficient funds as well as unauthorized alteration. Upon receiving the said intimation, the complainant gave a notice as envisaged under Section 138 of the Negotiable Instruments Act, 1881 {hereinafter referred to as "the Act"} on 22nd October, 1995. On 16th November, 1995, the complaint was lodged before the learned Magistrate. It was stated in the complaint that the notice given under Section 138 of the Act was received by the accused on 2nd November, 1995. The accused, therefore, preferred above application Exh. 46 claiming that the complaint lodged before the Magistrate was premature and the cognizance thereof taken by the learned Magistrate was erroneous and illegal. The learned Magistrate under his order dated 17th November, 1995 held that it was a matter of evidence whether the complaint was premature or not. However, the learned Addl. Sessions Judge under his order held that the cognizance of the offence is required to be taken on the basis of the statements made in the complaint. Considering the statements made in the complaint, the complaint lodged on 16th November, 1995 was ex-facie premature and on that count, the learned Addl. Sessions Judge made an order of discharge, as stated hereinabove.

4. Mr. Pandya has contended that in fact notice

issued under Section 138 of the Act was received by the accused on 28th October, 1995, and therefore, the complaint lodged on 16th November, 1995 cannot be said to be premature. He has, therefore, relied upon the reply given by the accused on 11th November, 1995 (Annexure "D" to the petition} and has submitted that it is an admitted fact that the notice under Section 138 of the Act was received by the accused on 28th October, 1995. However, it appears that the said reply dated 11th November, 1995 has not been produced on the record of the matter and it was for the first time referred to before the revisional court.

5. Section 138 of the Act is a penal provision and provides for imposition of punishment of imprisonment upon the drawer of cheque, for a term which may extend to one year or with fine, which may extend to twice the amount of cheque or with both, where any cheque drawn by such person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, inter alia because of the amount of money standing to the credit of that account is insufficient to honour the cheque. Proviso to the said section provides for a time frame for presenting the cheque to the Bank; for making a demand for payment of the money by giving a notice in writing to the drawer of the cheque and for payment of said amount of money to the payee by the drawer of such cheque. The time frame provided in the proviso is mandatory and if any action has not been taken in accordance with the said time frame, the action initiated under the said section shall fail.

6. In the present case, it is not disputed that the reply dated 11th November, 1995 referred to by Mr. Pandya has not been placed on the record of the matter. The complaint does disclose that the notice under Section 138 was received by the accused on 2nd November, 1995 and the complaint was lodged on 16th November, 1995 of which the cognizance was taken by the learned Magistrate. It, therefore, appears ex facie that the drawer of the cheque was not given an opportunity to make the payment of the said amount within 15 days as provided in proviso (c) to the said section. Thus, the petitioner has failed to adhere to the time frame provided under Section 138 of the Act and the cognizance taken by the learned Magistrate is clearly erroneous. The learned Addl. Sessions Judge, therefore, was right in holding that the complaint lodged by the petitioner under Section 138 of the Act was premature.

7. In view of the above discussion, this petition fails. Petition is dismissed. Rule is discharged. There shall be no order as to costs. Interim relief is vacated.

Prakash*